No. 93-613

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TESORERIA GENERAL DE LA SEGURIDAD SOCIAL DE ESPAÑA,
Petitioner,
v.
BANCO DE CRÉDITO INDUSTRIAL, S.A.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT BANCO DE CREDITO INDUSTRIAL, S.A. IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly decided an issue of Spanish law by relying on traditional principles of treaty interpretation, and disregarding the contention, made for the first time in a petition for rehearing, that it must solely defer to the opinion of a Spanish official.*

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* Banco Exterior de España, S.A., the successor banking corporation of Banco de Crédito Industrial, S.A., formerly Banco de Crédito a la Construcción, S.A., adopts the Rule 29.1 statement in the Petition for Writ of Certiorari at ii.

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BRIEF OF RESPONDENT BANCO DE CREDITO INDUSTRIAL, S.A. IN OPPOSITION

Respondent Banco Exterior de España, S.A., the successor banking corporation of Banco de Crédito Industrial, S.A., formerly Banco de Crédito a la Construcción, S.A., respectfully requests that this Court deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

1. Respondent loaned Marítima Antares, S.A. ("the shipowner") sums exceeding $40 million and took a mortgage on two ships. After the shipowner defaulted, respondent seized the two ships in July 1990 while they were in Louisiana and Texas ports. In the subsequent in rem proceeding consolidated in the United States District

Court for the Eastern District of Louisiana, petitioner Tesorería General de la Seguridad Social de España intervened and asserted a right to collect social security contributions arising out of the shipowner's employment of seamen on the vessels.

Petitioner deliberately chose a forum in the United States rather than in Spain. It intervened in the United States action to avoid presenting its claim in Spain where the shipowner was in bankruptcy and where a labor tribunal was determining the shipowner's debt to its seamen and employees for their wages. In the United States, petitioner opposed the shipowner's forum non conveniens motion, which sought a return of the dispute to Spain. Memorandum in Opposition to Motion to Reconsider Dismissal For Forum Non Conveniens, Record in No. 91-3922 at 741, 743 (petitioner "should not be forced to go to a jurisdiction where [it] did not choose to intervene").

2. United States law governs the priority of liens asserted against ships seized in United States ports. Respondent's preferred mortgage lien had priority over all other claims to the vessel, 46 U.S.C. § 31326(b)(1) (Supp. 1993), unless petitioner could establish that its claim was entitled to priority as a lien for "wages of the crew," 46 U.S.C. § 31301(5)(D) (Supp. 1993). In construing this statute, United States courts have repeatedly held that the priority for "wages" does not grant priority to claims for "taxes," including government claims against an employer for withheld United States income taxes and social security payments. The purpose of the "sacred" wage lien is to protect seamen, not to protect the government. *See, e.g., National Bank of North America v. S/S Oceanic Ondine*, 335 F. Supp. 71, 72-3 (S.D. Tex. 1971), *aff'd*, 452 F.2d 1014 (5th Cir. 1972); *Kesselring v. F/T Arctic Hero*, 1993 A.M.C. 447 (D. Alaska 1992).

The nature of a maritime lien, however, is determined by the law under which it arises. The question here was

thus whether Spanish law treats petitioner's claims as being claims with maritime wage lien status or whether Spanish law affords such claims some other priority, such as the priority assigned to taxes.

There is no directly applicable Spanish statute. Spanish law looks to the International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, Brussels, April 10, 1926, 120 L.N.T.S. 187 ("1926 Brussels Convention"), *reprinted in* 6C *Benedict on Admiralty* 15-24.20 (7th ed. 1993), Pet. App. J. 55a-65a.

3. In October 1990, respondent moved for summary judgment to establish the priority of its mortgage. In support of its motion, respondent submitted the expert affidavit of Antonio Viñal, Director of the European Institute of Maritime Studies at Gijoń, Spain, as well as a practicing lawyer and member of the Spanish Maritime Law Association. Señor Viñal offered the opinion that the Brussels Convention of 1926 did not confer maritime lien status on claims for unpaid social security contributions. He also pointed out that internal Spanish law treats such claims as having the priority for taxes, not the priority of a maritime wage lien. Supporting this opinion, respondent tendered excerpts of reports from several international bodies, including the Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects ("JIGE"), which is comprised of representatives of the United Nations Conference on Trade and Development and the International Maritime Organization.

All petitioner offered in response was a few excerpts from similar reports, an affidavit on the lien status of social security contributions in certain civil law countries that are not signatories to the 1926 Convention, and an unsworn "statement" from Señor Jose Antonio Cruz Ruiz, who describes himself as an official of the "General Office of the Merchant Marine." The statement concedes

that international reports show that Spain does not give social security claims maritime lien status, but says this is not the "official position of The Spanish Administration." Pet. App. F. 39a-40a.

In July 1991, the district court granted respondent's summary judgment motion. Pet. App. B. The court relied on the international reports and rejected all expert affidavits on both sides as being "conclusory." *Id.* at 31a.

4. Petitioner moved to alter and amend the judgment. Petitioner attacked the international reports as being outdated. Petitioner submitted the affidavits of three additional experts. Significantly, however, none of these three experts gave any weight to the opinion expressed by Señor Cruz Ruiz. None even mentioned his opinion as a factor in their determinations. *See, e.g.*, Pet. App. H. 45a. Rather, they opined that a "Spanish court" would hold with petitioner if it adopted their reading of the text of the 1926 Brussels Convention, certain internal Spanish statutes, and allegedly instructive precedent from France. *Id.* at 50a-52a. The district court denied the motion without opinion.

5. On appeal, the Fifth Circuit affirmed. It considered and rejected petitioner's two contentions. Pet. App. A.

First, petitioner contended that the broad language of the Brussels Convention supported a characterization of a social security claim as being a claim for wages under Article 2(2) of that Convention. The Fifth Circuit found petitioner's construction to be inconsistent with the text of the Protocol of Signature to the Convention. The Protocol says the Convention works "no impairment of the provisions in the national laws of the contracting States conferring a lien upon public insurance associations . . . ." The Fifth Circuit construed the Protocol as leaving it up to signatory countries to enact national legislation

which conferred such a lien. *Id.* at 15a. Drawing on the JIGE report, the court found that of 21 signatories to the 1926 Brussels Convention, only three recognized a maritime wage lien for social security contributions and, in each case, specific internal legislation had been adopted to accomplish that purpose. *Id.* at 15a-16a. Also, the tables in the JIGE report did not list the 1926 Brussels Convention as an authority which supported maritime lien status for social security claims. *Id.* at 17a.

Second, the Fifth Circuit rejected petitioner's argument based on certain Spanish internal laws which do not directly address maritime lien status. The court noted that petitioner's affidavits actually undermined petitioner's position because they conceded that Spanish internal law treats such claims as claims for taxes. *Id.* at 19a. *See* Pet. App. G. 49a ("equivalent to those taxes").

Finally, the Fifth Circuit noted that, if the law of the forum were applied, United States law does not regard social security and pension contributions as giving rise to a wage lien claim. Pet. App. A. 20a-22a.

6. In its petition for rehearing, petitioner introduced a new argument it had not previously raised. Petitioner argued for the first time that "all that is relevant" is the position espoused by a Spanish government official. Petition for Rehearing of Tesorería General de la Seguridad Social de España at 4. Petitioner tendered yet another unsworn statement from the General Directorate of the Merchant Marine, this time from Rafael Lobeto Lobo. Pet. App. G. Like the Cruz Ruiz affidavit tendered two years before, the Lobeto Lobo statement simply declares that the "General Directorate affirms that its interpretation since the named [1926] Convention came into force was that the [social security] contributions are included [in Article 2(2)]." *Id.* at 43a. The statement goes on to argue that Spain's recent support for amendments to the 1926 Convention to include the social security claim within wage lien status should not be construed to mean

that it does not believe that such a lien currently exists. *Id.*[1]

Petitioner cited no authority for the proposition that any court, whether in the United States or in Spain, would be required to defer slavishly to the self-serving opinion of a government official. The official "statements" themselves do not espouse this position, which is contrary to the approach taken by every other expert in the case. The court of appeals denied rehearing.[2]

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The only issue presented is one of Spanish law, which is inherently unworthy of review by this Court. But even if this Court were inclined to reach a question of foreign law, it is clear that the decision below is correct. Petitioner does not question the Fifth Circuit's interpretation of the text of the 1926 Brussels Convention, or its construction by other signatory countries. Rather, petitioner seeks review of a contention, raised for the first time on rehearing, that the Fifth Circuit was required

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[1] This claim is directly contrary to a contemporaneous news account which stated that the Spanish officials wanted new language in a 1993 Convention in order to "supersede" existing Spanish law:

> Strong support for the new convention was voiced by the Spanish representatives who indicated their government was likely to offer early ratification and was prepared to see the new international regime supersede domestic law.

New Convention on Maritime Mortgages, Lloyd's List, May 8, 1993.

[2] The Fifth Circuit refused petitioner's request to stay the mandate pending appeal. Petitioner did not seek a stay from this Court. On November 3, 1993, the district court dissolved and released the security bond which had provided the basis for continued jurisdiction in this in rem case. Petitioner did not appeal that decision. *See* App. 13a-15a.

to defer to the interpretation of the 1926 Brussels Convention espoused in conclusory, unsworn, statements submitted by two Spanish government officials.

Moreover, the petitioner concedes that the ultimate question is "what a Spanish court [w]ould do", Pet. at 10 n.6, yet the Petition fails to mention the only Spanish appellate court ruling on point, Judgment of February 12, 1993 (appeal by Impescamar, S.A.), Superior Court of Justice of Andalucía ("*Impescamar*"). Respondent has only recently learned of this decision. Petitioner was a party to the case, lost it, and yet made no mention of the decision in either its Petition for Rehearing or its Petition for Writ of Certiorari. An English translation of the decision is included in the appendix to this Brief in Opposition. App. 1a-12a. A duly authenticated copy of the original Spanish text has been lodged with the clerk and served on counsel opposite.

In sum, the decision below is correct and does not warrant further review.

I. THE FIFTH CIRCUIT APPLIED THE CORRECT STANDARDS OF TREATY INTERPRETATION AND ITS DECISION DOES NOT CONFLICT WITH ANY PRECEDENT OF THIS COURT OR OF ANY OTHER COURT OF APPEALS.

A. The Court of Appeals had the Discretion to Disregard an Argument Made for the First Time in a Petition for Rehearing With No Citation of Supporting Authority.

The Fifth Circuit's opinion does not address the question raised in the petition for certiorari, because petitioner did not timely and properly raise its contention that the court owed slavish deference to the opinion of the executive branch of the Spanish government.

Petitioner waived its contention in two ways. First, it did not raise the contention in its principal brief. Federal Rule of Appellate Procedure 28(a)(5) provides that the

principal brief of an appellant "shall contain the contentions of the appellant with respect to the issues presented . . . with citations to the authorities . . . relied on." The petition for rehearing is to bring to the court's attention points it has "overlooked," Fed.R.App.P. 40(a), not new points that were never presented.

Petitioner also waived its claim by not presenting the Fifth Circuit with any authority to support the argument it first raised in its Petition for Rehearing. Not one of the cases cited in the petition for certiorari was cited to the Fifth Circuit. The case for waiver here is made even stronger by petitioner's admission that the Fifth Circuit in oral argument specifically asked for guidance with respect to the factors to be consulted in treaty interpretation. *See* Pet. at 7-8.

Because the question was not properly raised below, and the Fifth Circuit's opinion does not address it, the question is not appropriate for certiorari review.

B. The Court of Appeals Was Not Required to Defer to an Unsworn Statement of a Spanish Government Official that Asserts a Treaty Interpretation Inconsistent with the Text of the 1926 Brussels Convention, Its Customary Interpretation Among Signatory Nations, the Past Official Spanish Position as Reflected by United Nations Documents, and Expert Affidavits.

Petitioner does not dispute that the Fifth Circuit's reading of the 1926 Brussels Convention is consistent with the text of the Convention, the Protocol of Signature, the uniform interpretation by the signatory nations, and even the past official Spanish position as reflected in the dispassionate JIGE report. Nor does petitioner deny that neither the Spanish Supreme Court nor the Spanish legislature has spoken on this question.

Petitioner, which deliberately kept this litigation away from the Spanish courts, now argues that United States

courts should ignore all these considerations because officials in a Spanish ministry have made conclusory statements that take a contrary view.

There is no merit to this position under either Spanish or United States law.

Spanish Law. The task of a United States Court in determining a question of Spanish law is to determine how a Spanish court would decide the question. Each of petitioner's experts phrased the question in precisely that manner. Petitioner has offered no evidence that a Spanish court would defer to a Spanish government official on this or any other issue. The Superior Court of Justice of Andalucía obviously did not defer to the executive branch position.

In fact, Spain follows international practice in treaty interpretation. It is a signatory to the 1969 Vienna Convention on the Law of Treaties, which requires that Spain interpret treaties by looking to the text, the context "including its preamble and annexes," and "subsequent practice in the application of the treaty" by signatory nations. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331, *reprinted in* 6C Benedict *on Admiralty* 21-14 (7th ed. 1993). Nothing in this Convention suggests that Spain would interpret a treaty by looking solely to the opinion of its own executive branch officials.

United States Law. In the absence of any peculiar Spanish rules, the Fifth Circuit correctly applied customary standards for determining the meaning of foreign law, including treaties. The factors considered by the Fifth Circuit are identical to those considered by the Supreme Court in the cases cited by petitioner. *See also* 1 Restatement (Third), The Foreign Relations of the United States § 325 (1986).

For example, in *United States v. Stuart*, 489 U.S. 353 (1989), this Court construed an international conven-

tion by beginning with the text, saying the "clear import of treaty language controls." *Id.* at 365. The Court said non-textual sources, such as ratification history and subsequent operation, could be used to determine the intent of the treaty parties. *Id.* at 366. Other aids to interpretation included the "practice of treaty signatories." *Id.* at 369. Finally, "[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Id.* (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982)).

Here the Fifth Circuit properly relied on the text of the Protocol of Signature, the operation of the 1926 Brussels Convention in signatory countries, and the construction of the treaty by JIGE, an intergovernmental body. The Fifth Circuit was certainly not compelled by *Stuart* to follow the conclusory, unsworn assertions of two Spanish governmental officials whose connection to this controversy is entirely unclear. Liens are customarily adjudicated by courts, not executive officers. There is no proof that petitioner has ever asserted the rights claimed here in any other proceeding anywhere in the world, other than in *Impescamar*, where its position was rejected.[3]

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[3] In this Court, petitioner offers yet another conclusory, ex parte, unsworn statement, a letter from the Spanish Ministry of Foreign Affairs asserting that petitioner's interpretation of the 1926 Brussels Convention is that of the "Spanish State." Letter of Jose Ignacio Carbajal to William K. Suter, Oct. 13, 1993. This letter confirms that the executive branch of the Spanish government agrees with petitioner. The letter offers nothing, however, to show that the Spanish Supreme Court would accept the executive branch position. The *Impescamar* court rejected that position.

Also, this Court should refuse to consider letters and statements first tendered on appeal, without any leave being sought or obtained to supplement the record pursuant to Fed.R.App.P. 10(e). Petitioner deliberately chose to litigate this dispute in the United States

None of this Court's other treaty cases on which petitioner relies are in any way inconsistent with the analysis used by the court of appeals. *See The Amiable Isabella*, 19 U.S. 1 (1821) (where treaty referred to passport in form "annexed" and no form was annexed, court would not follow treaty but would apply the law of prize); *Tucker v. Alexandroff*, 183 U.S. 424 (1902) (the meaning of treaties "is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts," *id.* at 438, reference made to text and construction by other countries); *Kolovrat v. Oregon*, 366 U.S. 187, 194-96 (1961) (in suit between private parties, deference would be given to notes exchanged between signatory countries, especially when supported by history of negotiations and text of other treaties); *Sumitomo Shoji America v. Avagliano*, 457 U.S. at 185 (in suit between private parties, deference given to "clear treaty language" confirmed by interpretation adopted by both signatory countries); *Chan v. Korean Air Lines Ltd.*, 490 U.S. 122, 134 (1989) (text prevails over argument based on drafting history).[4]

Nor is the Fifth Circuit's analysis of this treaty in conflict with an approach followed by any other court of appeals. *See Somportex Limited v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3rd Cir. 1971) (United States court would defer to prior decision of English court in same case), *cert. denied*, 405 U.S. 1017 (1972); *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) (deference given to French government's treaty interpretation which had been consistently and successfully asserted in domestic disputes).

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rather than in Spain and it is only reasonable that it should be bound by the procedural requirements of the United States Courts.

[4] Petitioner also cites *Chevron, U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837 (1984). *Chevron* discusses court deference to administrative agencies. The case does not address the interpretation of multilateral treaties, and it has no bearing on how a Spanish court would interpret the treaty at issue.

In sum, even if it is assumed that the Fifth Circuit rejected petitioner's Petition for Rehearing on the merits, the Fifth Circuit's mode of reasoning in this case is consistent with the precedents of this Court and the other courts of appeal. For this additional reason, this case does not merit further review.

II. A SPANISH COURT HAS NOW REJECTED PETITIONER'S INTERPRETATION OF THE 1926 BRUSSELS CONVENTION.

In its February 12 *Impescamar* decision, the Superior Court of Justice of Andalucía held that unpaid social security obligations owed to petitioner do not give rise to a maritime wage lien. That case arose from the 1987 application of a Spanish company, Impescamar S.A., for an export license to sell a vessel to a French company. In order to get the license, it was required to pay social security taxes which a prior owner of the vessel had not paid. Impescamar then brought an administrative proceeding to recover the payments from the regional division of plaintiff.

The Superior Court, an appellate tribunal, held that the money should be repaid to Impescamar. The court held that unpaid social security taxes do not give rise to a maritime lien which encumbers a vessel. Like the Fifth Circuit, the court found it significant that Spain had not adopted any specific law giving social security contributions wage lien status:

> the Social Security quotas are not "privileged credits [liens] which follow the vessel, even if the owner changes," since no national law exists which concedes to them [Social Security quotas] such character.

App. at 6a. The court concluded:

> [Impescamar] was not obligated to the payment of said quotas, since these do not constitute charges [liens] which would attach to the vessel . . . .

App. at 10a. Petitioner has appealed this decision to the Spanish Supreme Court. No decision is likely to be reached in the near future.

In view of this Spanish appellate court decision, it is simply incredible that petitioner would attack the Fifth Circuit's similar decision as an "affront to the government of Spain" which threatens "diplomatic chaos." Pet. at 16.

III. THE COURT OF APPEALS' DECISION DOES NOT RESTRICT SPAIN'S ABILITY TO ADOPT A DIFFERENT RULE IN THE FUTURE.

One of the reasons that the law of the United States gives preferred status to wages, but not to taxes, is governments have the authority to control the lien status of taxes.

If Spain wants its social security contributions to be given wage lien status, then all it has to do is enact appropriate legislation under Protocol II of the 1926 Brussels Convention. That is what Belgium, France, and Italy have done.

Another possibility would be for petitioner to prevail on the Spanish Supreme Court to reverse the decision of the Superior Court of Justice of Andalucía in *Impescamar*.

In any event, this Court should not grant certiorari to resolve a question of Spanish law, raised in only two reported cases, when the petitioner is a Spanish governmental agency which has at its disposal ample alternative means of seeking to persuade the Spanish legislature or Supreme Court to adopt its contrary view.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

A.M.P.A.

DON NARCISO RODRIGUEZ ESCOBAR, Secretary of the Second Section of the Chamber of Administrative Law Disputes in Seville of the Superior Court of Justice of Andalucia.

I CERTIFY: That in the appeal that is referred to below, the Chamber has rendered the following:

JUDGMENT

ILLUSTRIOUS MESSRS.
D. RAFAEL OSUMA OSIOS
DA. AMALIA BASANTA RODRIGUEZ
D. RAFAEL FERNANDEZ LOZANO

In the City of Sevilla, the 12th of February of 1993.

Before the Division of Administrative Law Disputes in Sevilla, of the Superior Court of Justice [Court of Appeals] of Andalucía, Appeal No. 1071/90, filed by the entity "IMPESCAMAR, S.A.", domiciled in Sevilla, represented by Attorney D. Manuel Pérez Perera and defended by Counsellor D. Fernando González de la Peña, against resolution of the Ministerio de Trabajo y Seguridad Social, represented and defended by the State Attorney. Tesorería General de la Seguridad Social is a co-defendant party, represented and defended by Counsellor D. Maximiliano Vilches Porran. The amount at issue was fixed at eleven million six hunrded thirty-four thousand six hundred twelve pesetas.

BACKGROUND

FIRST—In its written petition, the acting party requests that this Chamber render judgment annulling the disputed resolutions, with the other corresponding pronouncements of record.

SECOND—In its answer, the party sued requests a judgment dismissing the appeal interposed.

THIRD—The acting party interposed a petition for reconsideration of the decision of 2 October 1991, giving notification to the defendant and the co-defendant, bringing forth this petition of allegations. This Chamber issued a ruling dismissing said request. The co-defendant answered the petition requesting the inadmissibility of the appeal.

FOURTH—The parties were requested to present their written conclusions required by Article 78 of the Jurisdictional Law, and complied with said formality through their corresponding pleadings.

SIXTH—The legal prescriptions have been observed in the course of processing the appeal.

WHEREAS the judge rendering this decision is the Illustrious Magistrate Judge D. Rafael Fernández Lozano.

PRINCIPLES OF LAW

FIRST—For greater clarity of the controverted question, one should bear in mind the following: A) The vessel PLAYA DE YERBABUENA, registered in Book 7 of Vessels, folio 241, page No. 261, inscription 2nd of the Mercantile Registry of Santander, built by Astilleros de Santander, S.A. for Pesquerías de Barbate, S.A., as owner, and from which it acquired the possession and dominion on 22 August 1974, was mortgaged from 26 February 1974 with a mortgage guaranty of hypothecation credit for the construction of the vessel granted by CREDITO SOCIAL PESQUERO on 17 December 1973. Not having satisfied the hypothecation credit, said entity exercised a real hypothecation action to make effective its credit on 3 April 1978, the processing of which corresponded to the Court of First Instance No. 6 of Madrid, under No. 504/78, which decreed the embargo

[arrest] of the vesel and its annotation in the Mercantile Registry of Santander, which took place on 4 January 1977. Said Court, over the objection of Pesquerías de Barbate, S.A., sold the vessel on 10 February 1981 to Crédito Social Pesquero (folio 279 exp.) and by ruling of the month of 1981, cancelled the naval mortgage and the corresponding annotations of embargo, "and the other charges and liens, inscriptions and annotations which could have been exercised with posterity to the inscription of the mortgage." (F.304 expd). Among said annotations appeared in the Mercantile Registry of Santander, a preventive embargo annotation on the vessel dated 8 June 1979, decreed by the Labor Magistrate Court of Cádiz, in connection with unpaid social security quotas, which was prosecuted at the request of the Instituto Social de la Marina against Pesquerías de Barbate, S.A. seeking recovery of 17,000,000 [pesetas]. (f.243 exp).

Crédito Social Pesquero sold the vessel to D. Florentino Puerta Oviedo and his wife Da. María Juana Medina Gómez on 14 June 1985 (f. 305 exp.), who in turn sold it on 11 November 1985 to Puerta y Sola, S.A. (f. 320 exp.) which changed its name to IMPESCAMAR, S.A. on 2 December 1985 (Power of Attorney), which sold it to "SOCIETE D'ARMEMENT ET DE PECHE AL MOONIA, S.A." on 12 December 1985 (f. 333).

SECOND—On a certain date which is unknown but which of course is in 1986, the appellant IMPESCAMAR, S.A. requested from the Directorate General of Exports, a dependent of the State Secretariat of Commerce, of the Ministry of Economics and Treasury, an export license for the vessel destined to the referenced French company, which was "DENIED. Because of unfavorable report of the competent Organism" with a date which does not appear (folio 330 exp.). In said report, the Directorate General of the Instituto Social de la Marina, states on 9 April 1986 (Document 2 of the peti-

tion): With respect to your request dated 26 February last, registered with exit number 37/541, of 4 March, concerning the export of the vessel "PLAYA DE YERBABUENA", I communicate to you the following: 1—In accordance with the report of the Provincial Delegation of Cadiz and with certification issued by the Section of Control and Quotations of this Institute, said vessel has unpaid quotas for the periods November 1979 to December 1980, March 1981 to June 1982 and August to October of 1982, in the total amount of 6,479,135 pesetas; 2—In concordance with that established in Article 9 of the Refunded Text of the Special Rules of the Social Security for Workers at Sea, approved by Decree 2664/1974 of 30 August, an unfavorable decision is reported for the deletion of the flag for the export of said vessel.

THIRD—The appellant objects in this proceeding to the agreements of 11 September and 26 November 1987 of the Tesorería Territorial de la Seguridad Social de Cádiz which dismissed the petition which had been filed on 7 February 1987 for the return of 11,634,612 pesetas, plus interest, and the appeal of repossession formulated the following 20-9 (f.1 and 106 exp), and that of the Provincial Directorate of the Instituto Social de la Marina de Cádiz, of presumptive denial of the petition of 7 February 1987 requesting payment "in concept of damages" "the quantity of 3,900,000 pesetas for the delay in exporting the vessel . . . due exclusively to their improper and unlawful actions, demanding the payment of quotas which . . . were not owed."

In the petition filed, there is a demand, in addition to requesting the nullity of said agreements, of a series of pretensions which are unrelated to this proceeding, as will be discussed.

The Tesorería Territorial, in addition to alleging the cause of inadmissibility provided in Article 81(g) of the Jurisdictional Law, bases its opposition on Articles

24.1(b) and 25 of the Regulation of Special Rules of the Sea. The State Attorneys request the inadmissibility of the appeal as a result of the report of the Instituto Social de la Marina not being an actionable administrative act since it is a new procedures act, and if it were an actionable one, the administrative remedies have not been exhausted.

FOURTH—With respect to the causes of inadmissibility alleged by Tesorería and the State Attorneys, one has to bear in mind that the appealed decision from the Instituto Social de la Marina, is not the report issued on 9 April 1980, previously transcribed, nor the denial of the export license, but rather the presumptive denial by the Provincial Directorate of Cádiz of the petition that was made on 7 February 1987 requesting the indemnity of 3,900,000 pesetas for damages sustained because of the delay in exporting the vessel, as a result of being denied the export license because of the debated report, and said agreement of presumptive denial does not exist since the appellant has not denounced the delay (Article 94 L.P.A. and 38.1 L.J.) for which reason the causes of inadmissibility alleged by the respondents do not exist and that provided by Article 82, or in relation with 38.1 of the Jurisdictional Law, has not been alleged; but said issue is of no moment from the point in time when the appellant abandons said pretension in the petition and substitutes it with the indemnity for damages, in the initial amount of 5,500,000 pesetas "for the erroneous forwarding of this matter to the Social jurisdiction", which cannot be adjudicated in this process, since the [scope of the] initial petition of this administrative law appeal is that established by the limits of the process (Articles 57 L.J. and S.T.S. 11.11.69 and 11.3.90, among others).

FIFTH—According to Law 21 of August 1893, of Naval Hypothecation, the vessel is an immovable object (Article 1), even though for other effects it has the condition of being a movable object (Article 585 C. Com-

merce), for that reason for those effects, the vessel responds to all charges and liens which appear in the Mercantile Registry of the place of registration, regardless of who is the owner; but if as a result of the execution of a naval mortgage with guaranty of a construction credit, the same is cancelled, so are all the charges, liens, inscriptions and annotations inscribed in the Mercantile Registry with posterity, leaving the vessel free of charges and liens as an immovable (Article 50.2 L.H.N. and L.E. Civil), which occurred by the decree of April of 1981, issued by the Court of First Instance No. 6 of Madrid, which cancelled the preventive embargo annotation of 8 June 1979, decreed by the Magistrate Labor Court of Cádiz for unpaid social security quotas. In addition to that indicated, one should bear in mind that in conformity with Articles 31 and 32 of the Naval Hypothecation Law and Articles 2, 3 and 8 of the Brussels Convention of 10 April 1926, the Social Security quotas are not "privileged credits [liens] which follow the vessel, even if the owner changes," since no national law exists which concedes to them [Social Security quotas] such character.

SIXTH—Having discarded the responsibility of IMPESCAMAR, S.A. as owner of the vessel PLAYA DE YERBABUENA, we proceed to analyze if it has personal responsibility as a result of being the successor of previous businesses, whether they are shipping interests, ship operators, or owners of the vessel. The Administration alleges that the appellant is solidarily liable for the Social Security quotas which accrued prior to the sale of the vessel as a result of that established in Article 24.2(b) of the Regulations concerning the Special Rules of the Social Security for Workers at Sea approved by Decree 1867/70 of 9 July and as a result of not having requested from the Institute Social de la Marina an accredited certificate regarding the status of the previous Company with respect to its obligations for quotas under said Special Rules; a solidary responsibility which this Chamber cannot accept due to the general rule that for

an obligation to have solidary character, it has to be expressly constituted as such (Article 11.37 C. Civil), and that it is a law and not a general disposition of inferior juridical rank which has to declare the solidary liability (see Article 37 of the General Tributary Law).

This is corroborated especially for the payment of Social Security debts by those solidarily responsible in Article 10.1 of the General Regulations for Collection of Social Security, approved by R.D. 716/86, of 7 March and Article 6 of the Order of 23 October 1986, which develops that, in establishing: "The solidary responsibility for the payment of Social Security debts derives from the fact that the responsible party is made liable for the payments by the regulatory norms of the different authorities of the Social Security system which expressly imposes such responsibility", in other words, "on the assumption that legally or conventionally such responsibility is expressly imposed", necessitating that it be a law that imposes this solidary responsibility and not any general disposition of inferior rank.

SEVENTH—Effectively, Article 24.2(b) states "The acquiring party, in the cases of succession of title of a vessel or exploitation, will respond solidarily with the previous titular or with his rights the payment of the accrued quotas prior to said succession", but it is a case that said precept lacks legal coverage, which renders it a nullity under law in conformity with Articles 47.2 L.P.A. and 28 L.R.J.A.E., and while this Chamber may lack competence to declare the nullity of said precept, it likewise does not have competence to adjudicate the individual application of this act, on the basis that same is not in conformity with Law (Article 39.4 L.J.); control of the regulatory jurisdiction of the Administration which is imposed under Article 8 of the L.O.P.J.

Said Regulation develops Law 116/1969 of 30 December concerning the Special Rules of Social Security of Workers at Sea, which does not contain any express pre-

cept which authorizes the solidary responsibility of Article 24.2(b) which has been cited, and derogated whatever laws and dispositions are imposed to that established in same. Subsequent to the Regulation of 1970, through Decree 2864/1974, of 30 August the Refunded Text of Laws 116/69 and 24/72 of 21 June and of its Articles 7, 9, 11, 15 and 17, solidary responsibility is not reduced in any way between the acquirer of the vessel and its previous owner, only Article 9 imposes the obligation of justifying that the vessel is inscribed in the Registry of the Representative Entity and "is found current in the payment of quotas" but only as a necessary requirement "for the marine authorities to authorize its departure for sea", but without any possibility of the non-fulfillment of said obligation converting the infractor in a subrogee of the pending obligations and making him solidarily responsible for the quotas corresponding to the previous owners of the vessel. Neither does the Refunded Text of the General Social Security Law, approved by D.2065/1974 of 30 May establish the debated responsibility and only the solidary responsibility of Article 97.2, such that Chapter III "Protecting Action" and Section 2nd "General Rules of Contributions", in which it is comprised, as with its content: "the acquiring party will respond solidarily with the previous party or its heirs for the payment of contributions caused prior to said succession" does not permit the establishment of a solidary responsiblity with respect to the pending quotas in the "cases of succession in the title of exploitation, industry or business", and only with respect to the payment of pensions.

EIGHTH—In the cases of succession of title of vessels, Article 25.1 of the Regulation of 1970—D.1867/70 of 9 July, all that it does is *facultate* the acquiring party, and not impose the obligation to request from the Instituto Social de la Marine the issuance of an accredited certificate of the situation of the Company with respect to its obligations for payment of quotas to "said Special Rules" without the non-use of this faculty implying a

solidary responsibility, especially when said percept lacks the legal coverage required to deduce said solidary responsibility.

NINTH—The State Attorneys allege that the solidary responsibility of successor companies is covered by Article 44 of the Worker's Statute of 1980, which is not admissible since what said precept establishes is that the new employer shall be "subrogated in the labor rights and obligations of the previous company", leaving the assignee and the assignor "responding both solidarily during three years of the labor obligations which arose prior to the transmission and which have not been satisfied"; a precept which by being included in Section 2 of Chapter III: Modification, suspension and extinction of the contract of employment, "cannot refer to the quotas owed for Social Security by the previous owner, *but only to the existing labor relationships* between the employees of the previous company and the acquirer of the same.

TENTH—One cannot forget that in conformity with Articles 43 to 45 of R.D. 716/86 and Article 37.1 of the Order of 23 October 1986, norms which have already been cited, the obligation for payment of Social Security quotas prescribes in five years, beginning with the date they should have been perceptively paid and will be applied officially both in the collection proceedings for the voluntary period as well as in a judicial collection proceeding. When the appellant paid on 9 January 1987 the 11,624,612 pesetas, the return of which it claims in this proceeding, and which payment was made "without supposing the recognition of any debt or responsibility, without prejudice and reserving all rights of actions", the quotas which should have been paid prior to 9 January 1982 were prescribed; of those paid in the Magistrate Labor Court of Cádiz (folios 22 and 23 exp.), clearly the quotas corresponding to Pesquerías de Barbate, S.A. were prescribed since they were for the year 1970, without knowing their quantity, and those paid in the name of

Diego Grimaldi, S.A. and in the voluntary period, likewise those corresponding to the period April to December 1981 in the amount of 3,439,328 pesetas (f.14 exp); concerning the remaining quotas, we do not have sufficiently clear information in order to opine on their prescription.

ELEVENTH—If the quotas which were owed were 11,634,612 pesetas, 6,470,135 or 5,310,031 pesetas or another amount, a question which arises because of the diverse and contradictory certifications which are found in the file and decrees, it is totally indifferent [of no moment] since that which is requested by the appellant is the return of the first quantity, as an improper payment effected on 9 January 1987; a right which is conceded by Section 3 of Chapter IV of Title I of the Order of 23 October 1986 and Article 50 of the Refunded Text 1974-D.2065 of 1974, and if they are subordinated to a requirement that the amounts "must have been paid through error of fact or law", in the present case, the return is even more justified, since the appellant was not obligated to the payment of said quotas, since these do not constitute charges [liens] which would attach to the vessel, nor does the appellant have any solidary responsibility for same, and if these payments were made, they were made under formal protest and due to the negative [response] of the Administration in not granting the export license to the vessel as a consequence of the report issued by the Instituto Social de la Marina to the effect that the vessel had unpaid Social Security quotas, in the total amount of 6,479,135 pesetas, which is not true as has been reasoned, which is why we proceed to accede to the return [of the Social Security quotas].

TWELFTH—We do not find that bad faith or temerity exists such that would warrant the imposition of costs.

WHEREAS, having considered the cited articles and those of general application.

WE RULE: That rejecting the causes of inadmissibility offered by the State Attorney and Tesorería de la Seguridad Social and finding not to be in conformity with Law the Resolutions of 11 September and 26 November 1987 of the Tesorería Territorial de la Seguridad Social de Cádiz, we annul same finding them contrary to the juridical Order, and we accede in part to the pretensions pled by IMPESCAMAR, S.A. in its petition, ordering Tesorería to return to the appellant ELEVEN MILLION SIX HUNDRED THIRTY-FOUR THOUSAND SIX HUNDRED TWELVE pesetas, plus legal interest from 9 January 1987 until the date of payment, and in any event, we hold prescribed those quotas which are prior to 9 January 1982; without costs. And in due course with a certification of this judgment for its fulfillment, we return the administrative file to its place of origin.

Thus, this is our judgment, definitively ruling, and we pronounce, order and sign same.

SIGNATURES

That inserted [hereinabove] comports to the letter with its original to which I remit myself, the judgment remaining deposited in the Secretariat. And to confirm came, I extend the present,

SIGNATURE

SEAL

APOSTILLE (or sole legalization)

(Hague Convention of 5 October 1961
Royal Decree/1978 of 2 October)

1. Country: Spain.

   The present public document.

2. Has been signed by D. NARCISO RODRIGUEZ ESCOBAR.

3. Acting in his capacity as Secretary of the Chamber of Administrative Law Disputes.

4. It is sealed stamped with the seal of the Chamber of Administrative Law Disputes.

CERTIFIED

5. In Granada

6. On 16-11-93

7. By the Secretary of the Superior Court of Justice of Andalucia.

8. With Number: 1027/9

9. Seal Stamp.

10. Signature

[SEAL]

Signed MANUEL DOCAVO PAN

Minute Entry
McNamara, J.
November 2, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 90-2376 cc
SECTION "D" (1)

PARCEL TANKERS, INC., *et al.*

versus

M/T STOLT LUISA PANDO, *et al.*

[Filed Nov. 3, 1993]

Before the court is a Motion to Dissolve Security and Tax Costs on Appeal Pursuant to FRAP 39(e), which was filed by Plaintiff, Banco Exterior de Espana, S.A., formerly Banco de Credito Industrial, S.A. ("BCI"). Defendant, Tesoreria General de la Seguridad Social de Espana ("Tesoreria General"), has filed an opposition to this motion which is before the court on briefs, without oral arguments.

This motion stems from a long, complex legal dispute in which the court is all too familiar and which is thankfully nearing an end. On July 29, 1993, the United States Fifth Circuit Court of Appeals affirmed this court's granting of summary judgment in favor of BCI finding, inter

alia, that Tesoreria General was not entitled to a maritime lien for unpaid social security contributions. The Fifth Circuit has denied both Defendant's Motion for Rehearing and Motion to Recall and Stay the Mandate Pending Application for a Writ of Certiorari to The United States Supreme Court on July 19, 1993 and August 24, 1993 respectively. As a result, BCI seeks to dissolve the substitute security posted by it, as evidenced by the Amended Bond in the amount of $8,000,000.00 dollars presented by BCI, as principal, and The Aetna Casualty and Surety Company as surety, and further seeks that the amount of bond premiums and bank confirming fees BCI has paid in relation to the Amended Bond be taxed as costs on appeal against Tesoreria General pursuant to FRAP 39(e). While the court finds that the Amended Security bond should be dissolved as the Fifth Circuit has ruled in favor of BCI and has failed to grant Defendant a stay, this court declines to tax as costs the amount of bond premiums and bank confirming fees BCI has paid in relation to the Amended Bond.

In pertinent part, FRAP 39(e) states "the premiums paid for costs of supersedeas bonds or other bonds to preserve rights pending appeal . . . shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule." This court is convinced that FRAP 39(e) is inapplicable to this case because the security posted by BCI was neither a supersedeas bond nor a bond to preserve rights on appeal. The security posted by BCI was done so voluntarily in order to secure claims by various parties due to the peculiarities of this case, which included vessel arrest and a substitution of the bond for the res in the registry of the court. BCI "offered to secure all outstanding claims on appeal in exchange for the privilege of withdrawing the monies on deposit with the registry of this court." *See* Minute Entry dated May 6, 1992. BCI could have chosen to leave the monies in the registry of the court, thereby avoiding

the expense of posting security. Therefore, BCI cannot now recover the expense of posting security which it chose to do solely for its own benefit.

Plaintiff cites *Trans World Airlines, Inc. v. Hughes,* 515 F.2d 173 (2nd Cir. 1975) and *Bose Corp. v. Consumer Union of U.S., Inc.,* 806 F.2d 304 (1st Cir. 1986) in support of its attempt to have this court tax as appeal costs BCI's expenses relating to letters of credit to secure a bond. While these cases have allowed taxation of expenses relating to letters of credit, they have each been premised upon a finding that these expenses were incurrd in lieu of the expenses attendant to a supersedeas bond. BCI prevailed in the trial court and voluntarily offered to post security in order that it could have the privilege of withdrawing the monies from the registry of the court. Because a supersedeas bond secures a prevailing party against any loss sustained as a result of being forced to forego execution on a judgment, BCI's expenses in posting the bond was not incurred in lieu of the expenses attendant to a supersedeas bond. Thus, this court finds FRAP 39(e) inapplicable. Accordingly,

IT IS ORDERED that Plaintiff's Motion to Dissolve Security be and is hereby GRANTED, DISSOLVING and RELEASING the Amended Bond for EIGHT MILLION AND NO/100 ($8,000,000.00) DOLLARS presented by Banco Exertior de Espana, S.A., formerly Banco de Credito Industrial, S.A. ("BCI"), as principal, and The Aetna Casualty and Surety Company, as surety.

IT IS FURTHER ORDERED that Plaintiffs Motion to Tax Costs on Appeal Pursuant to FRAP 39(e) be and is hereby DENIED.

* * * *